



**Lewis, Longman & Walker, P.A.**  
Attorneys at Law

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**Florida Water Law:  
Limited Availability in the Land of Abundance**

*Water Sustainability Plenary*  
AIChE Spring National Meeting, Tampa, FL  
**April 29, 2009**

**Presented by: Michelle Diffenderfer, Esquire**

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# Biography

- Shareholder - Lewis, Longman & Walker, P.A., West Palm Beach, Florida
- American Bar Association Section on Environment, Energy and Resources – Executive Council and Strategic Planning Committee
- General Counsel – Chamber of Commerce of the Palm Beaches
- Chair ABA SEER Eastern Water Resources Conference 2008

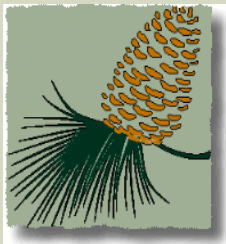
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# Water Law – East v. West

## The Western Way – Prior Appropriations

- In prior appropriation states, water is a property right
- Water rights are allocated pursuant to the principle of “first in time, first in right”
- The first person to put the water to a “beneficial use” has the right to the continued use of that amount of water, to the exclusion of everyone with junior rights
- Water rights can be lost if the water claimed is not consistently put to a beneficial use.

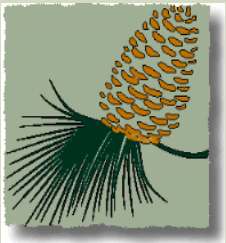




# Water Law – East v. West

## The Eastern Way – Riparian System

- Water is not a property right, but rather a resource shared in common by riparian landowners, and to some extent, the public
- Landowners bordering a water body are entitled to make “reasonable use” of the water from that water body
- Riparian water rights cannot be exercised to the detriment of the reasonable use of the water by other riparian landowners





## So, what law applies?

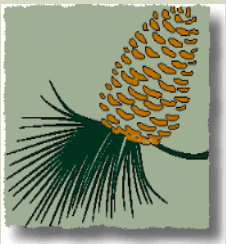
- Based on their location and history you will find that States use either the prior appropriations or riparian system for allocating water or a combination.
- Florida is an example of a state that has followed a riparian system with modifications.



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# Balancing Demands: Principles of Florida's Water Rights System

- Florida is a modified riparian state
- Florida waters (groundwater and surface waters) are held in trust for the benefit of its citizens
- Ownership of land does not equal ownership of water, or the right to use water
- Right to use water is regulated by the State through regional water management districts



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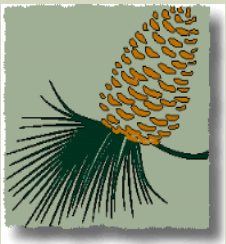


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# Abundance and Shortage

While Florida is a wet state that receives about 54 inches of rainfall each year, the timing and location of that rainfall combined with the demands of Florida's environmental and human consumers require laws that regulate and allocate water use

Source: Florida Department of Environmental Protection, available at <http://www.dep.state.fl.us/Drought/faq.htm>

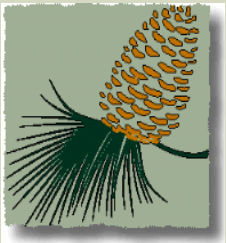


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# Man Altered System

- Florida's state water managers encounter different challenges during the wet and dry seasons
- During the wet season, state water managers must maintain a system of canals and stormwater systems to divert and/or store excess water to protect both the human and natural environments
- During the dry season, state water managers must allocate the distribution of the stored water for human and environmental use and restrict water use, if necessary

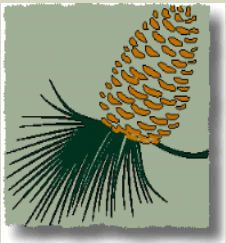






# The Range of Demands

- **Environmental Demands** –
  - Fish and Wildlife Habitat (Lakes, Rivers, Estuaries, the Everglades)
  - Water Quality (Lake Okeechobee)
- **Human Demands** –
  - Human Consumption
  - Agriculture/Irrigation
  - Industry

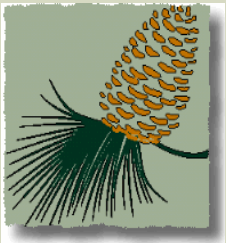




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# Elements of Florida's System: Regulation of Human Consumption

- **Consumptive Use Permits (CUPs)**
  - Primary mechanism for regulating consumptive use of water from groundwater and surface water in Florida
- **Water Shortage Plans**
  - Implemented during water shortages to protect state water resources from harm and to provide equitable distribution of water resources among use classes



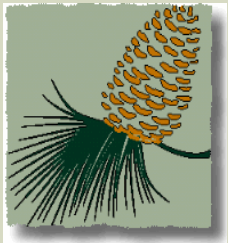
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## Elements of Florida's System: Considerations for Natural Systems

- **Minimum Flows and Levels (MFLs)**
  - Provide thresholds below which further consumptive use of water shall not be permitted
- **Reservations of Water**
  - Reserved from consumptive uses to provide protection for fish and wildlife or public health and safety



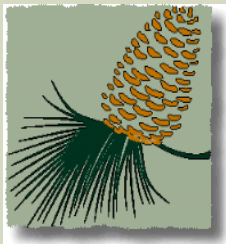
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# Criteria to Obtain a Consumptive Use Permit

The proposed use must:

1. be reasonable-beneficial
2. not interfere with existing legal uses
3. be consistent with the public interest





# Water Shortage Plans

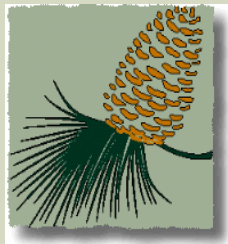
- In times of drought, the water management districts implement water shortage plans that restrict the water available to existing consumptive users
- In south Florida, there are four phases of restrictions which correlate with the severity of the water shortage
- Each water user is classified according to the source of water supply, method of withdrawal and the type of water use
- Water restrictions are established for each phase of water shortage and each water use class



# Minimum Flows and Levels

- **Minimum Flow** - the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area
- **Minimum Level** - the level of groundwater in an aquifer and the level of surface water at which further withdrawals would be significantly harmful to the water resources of the area

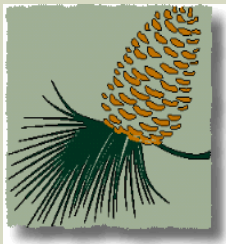
- *Florida Statutes, Section 373.042(1)(a)-(b)*





# Minimum Flows and Levels

- Calculated based on “the best information available”
- Can reflect seasonal variations
- Seek to protect fish and wildlife resources, water quality and quantity, and recreation and navigation interests
- Have been adopted for surface waters and aquifer systems
- Do not guarantee that the water body will receive sufficient water to prevent harm
- Are triggers that require Districts to implement prevention and recovery plans

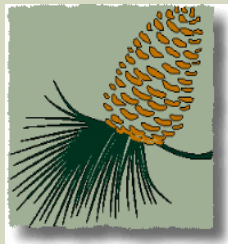




# Reservations of Water

- **Chapter 373.223(4), Florida Statutes:**

The governing board or the department, by regulation, may reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety. Such reservations shall be subject to periodic review and revision in the light of changed conditions. However, all presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest.

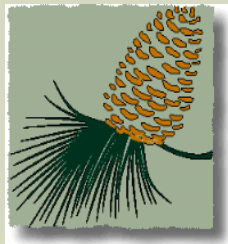






# Reservations of Water

- Identify natural system needs through indicator regions
- Establish appropriate quantity, timing and distribution of water managed for the natural system
- Establish hydrographs and salinity envelopes
- Seek to maintain sufficient water in the natural system by removing it from the water supply

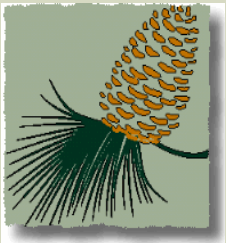




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# How Do Reservations Fit Into the CUP Process?

- Reservations are evaluated as one factor of permit issuance criteria, similar to Minimum Flow and Level compliance
- Reservations are translated into permitting criteria that are considered by the permit reviewer upon evaluation of a CUP application for a new use or a renewal

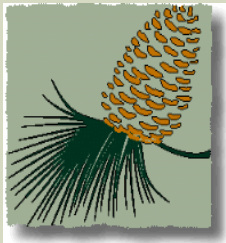


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## Limited Sources of Availability

- The South Florida Water Management District has identified several water sources with limited availability including:
  - Lake Istokpoga/Indian Prairie Canal System
  - C-23, C-24 and C-25 Canal System
  - L-1, L-2 and L-3 Canal System
  - Pumps on Floridan Wells in Martin and St. Lucie Counties
  - Northern Palm Beach County Service Area
  - Lower East Coast Service Areas 1,2, and 3 (Everglades-Based Sources)
- Those seeking CUPs from limited sources generally must identify alternative sources





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# Limited Sources Require Conservation

## Conservation Measures

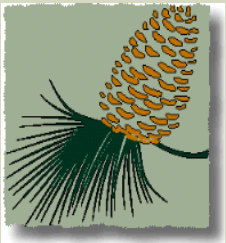
- Water efficient fixtures
- Metering and higher rates
- Implementation of Water Shortage Plans
- More efficient Irrigation Technologies
- Consumer Education

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# Limited Sources Require Alternatives

- **Alternative Water Supplies**
  - Aquifer Storage Recovery (“ASR”)
  - Desalinization
  - Reservoirs
  - Floridan Aquifer Wells
  - Water Reuse
  - Reclaimed Water





# Interstate Water Conflicts

- Florida and Alabama have been in litigation with U.S. Army Corps of Engineers and Georgia regarding water use since 1970s.
- Apalachicola-Chattahoochee-Flint River System is at the center of the dispute.
- Georgia using the water at the top of the river system to the detriment of Alabama and Florida.



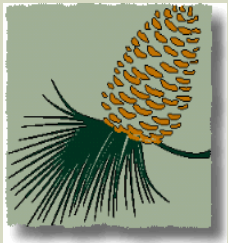
# ACF Litigation

- Supreme Court denied Georgia's appeal of the DC Circuit's decision that the Corps' reallocation of water from the system to Georgia requires Congressional approval.
- Congressionally authorized purposes of the Corps' operation of the river dams are for power, navigation and flood control. Not water supply.
- Parties anticipate rulings soon from the federal court.



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# Discussion



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